

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TERRY PHILLIPS

Plaintiff,

vs.

GREG COX, *et al.*,

Defendants.

3:06-CV-00620-LRH (VPC)

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

May 16, 2008

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion for summary judgment (#23). Plaintiff opposed (#37) and defendants replied (#38). The court has thoroughly reviewed the record and the motions and recommends that defendants' motion for summary judgment (#23) be granted.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff Terry Phillips ("plaintiff"), a *pro se* prisoner, was formerly incarcerated in the custody of the Nevada Department of Corrections ("NDOC") at the Northern Nevada Correctional Center ("NNCC") (#13).¹ Plaintiff brings his first amended complaint pursuant to 42 U.S.C. § 1983, alleging violations of his Eighth Amendment right against cruel and unusual punishment. *Id.* Plaintiff names as defendants Bruce Bannister, NDOC Medical Director; Greg Cox, High Desert State Prison ("HDSP") Warden; Ted D'Amico, former NDOC Medical Director; Bob Hartman, HDSP Director of Nursing; David Mumford, HDSP Physician; and "Ben," "Debbie," and "Peggy," HDSP Nurses. *Id.*²

¹ Plaintiff was released from prison in August 2007 (#20).

² The court dismissed defendants Cox, Crawford and Whorton in its screening order of plaintiff's original complaint (#5). The Nevada Attorney General's office then accepted service for defendants D'Amico and Hartman, but not defendants Mumford, "nurse Ben," "nurse Debbie," and "nurse Peggy" (#7).

1 In his amended complaint, plaintiff alleges that prior to his incarceration, he was the
2 victim of a gunshot wound that caused an A-V fistula/malformation in his head.³ Plaintiff claims
3 that between July and December 2004, defendants only gave him Tylenol for the pain even
4 though they knew he required medical attention. Plaintiff admits that during this same time
5 period he also had an angiogram and a cat-scan performed, and saw a vascular surgeon twice.
6 On December 2, 2004, an outside surgeon, Dr. Joseph Caresio, performed an “embolization.”
7 Plaintiff claims that when the surgery began, Dr. Caresio stated, “This is not what they said.” In
8 response to plaintiff’s questioning, Dr. Caresio told plaintiff that he had not known plaintiff had
9 had an angiogram because defendants did not provide him with it. After the embolization, Dr.
10 Caresio allegedly told plaintiff that “he did what he could,” but that the hole in his artery was too
11 big to correct through an embolization. Plaintiff claims that defendants deliberately withheld the
12 angiogram from Dr. Caresio, which caused Dr. Caresio to perform the “wrong procedure” on
13 plaintiff, which, in turn, caused irreparable damage to his artery. Plaintiff claims that he has had
14 two surgical procedures since the first embolization, but has been told that because of what was
15 done on December 2, 2004, it is too dangerous to try to repair the artery now, and that nothing
16 more can be done.

17 Plaintiff further alleges that after defendant Bannister became the NDOC Medical
18 Director, he cancelled all inmate appointments with outside physicians, and plaintiff was not
19 permitted to attend a previously scheduled appointment with a specialist on March 31, 2006.
20 Plaintiff alleges that defendants then put him on methadone for the pain and denied him further
21 treatment.

22 _____
23 Plaintiff then amended his complaint, adding defendant Bannister, and again including unserved defendants
24 Cox, Mumford, “Ben,” “Debbie,” and “Peggy” (#13). Defendant Cox was dismissed in the court’s original
25 screening order because plaintiff had failed to allege that Cox personally participated in any of the alleged
26 constitutional violations (#5). Plaintiff’s amended complaint suffers from the same failure; therefore,
27 defendant Cox should not have been included in plaintiff’s amended complaint. Further, the record does not
28 reflect that defendants Cox, Bannister, Mumford, “Ben,” “Debbie,” or “Peggy” were served with a copy of
either the original or amended complaint.

27 ³ “An arteriovenous (AV) fistula is an abnormal passageway between an artery and a vein.” See
28 <http://www.mayoclinic.com/health/av-fistula/HQ00263>.

The Court notes that the plaintiff is proceeding *pro se*. “In civil rights cases where the plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the benefit of any doubt.” *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

II. DISCUSSION & ANALYSIS

A. Discussion

1. Summary Judgment Standard

Summary judgment allows courts to avoid unnecessary trials where no material factual disputes exist. *Northwest Motorcycle Ass’n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th Cir. 1994). The court grants summary judgment if no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In deciding whether to grant summary judgment, the court must view all evidence and any inferences arising from the evidence in the light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). In inmate cases, the courts must

[d]istinguish between evidence of disputed facts and disputed matters of professional judgment. In respect to the latter, our inferences must accord deference to the views of prison authorities. Unless a prisoner can point to sufficient evidence regarding such issues of judgment to allow him to prevail on the merits, he cannot prevail at the summary judgment stage.

Beard v. Banks, 126 S.Ct. 2572, 2576 (2006). Where reasonable minds could differ on the material facts at issue, summary judgment should not be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

The moving party bears the burden of informing the court of the basis for its motion, and submitting evidence which demonstrates the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings but must set forth specific facts showing that there exists a genuine issue for trial. *Anderson*, 477 U.S. at 248. Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party who fails to make a showing sufficient to establish the existence of an

1 element essential to that party's case, and on which that party will bear the burden of proof at
2 trial. *Celotex*, 477 U.S. at 322-23.

3 **2. Deliberate Indifference Standard**

4 A prison official violates the Eighth Amendment when he acts with "'deliberate
5 indifference' to a substantial risk of serious harm to an inmate." *Farmer v. Brennan*, 511 U.S.
6 825, 828 (1994). To establish an Eighth Amendment violation, a plaintiff's case must satisfy an
7 objective standard – that the deprivation was serious enough to amount to cruel and unusual
8 punishment, and a subjective standard – deliberate indifference. *Id.* at 834; *see also Wilson v.*
9 *Seiter*, 501 U.S. 294, 297-304 (1991).

10 The objective standard, a "serious medical need," is met if the failure to treat a prisoner's
11 condition could result in further significant injury or the "unnecessary and wanton infliction of
12 pain." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The Ninth Circuit's examples of serious
13 medical needs include "the existence of an injury that a reasonable doctor or patient would find
14 important and worthy of comment or treatment; the presence of a medical condition that
15 significantly affects an individual's daily activities; or the existence of chronic and substantial
16 pain." *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (citations omitted).

17 The subjective standard of deliberate indifference requires "'more than ordinary lack of
18 due care for the prisoner's interests or safety.'" *Farmer*, 511 U.S. at 835, *quoting Whitley v.*
19 *Albers*, 475 U.S. 312, 319 (1986). The requisite state of mind lies "somewhere between the poles
20 of negligence at one end and purpose or knowledge at the other." *Id.* at 836. It is the equivalent
21 of recklessly disregarding a substantial risk of serious harm to the inmate. *Id.* Prison medical
22 staff do not violate the Eighth Amendment simply because their opinion concerning medical
23 treatment conflicts with the opinion of the inmate-patient. *Franklin v. Oregon*, 662 F.2d 1337,
24 1344 (9th Cir. 1981).

25 **B. Analysis**

26 **1. Procedural History**

27 After defendants filed their motion for summary judgment on September 10, 2007,
28 plaintiff failed to file an opposition. On October 17, 2007, the court *sua sponte* granted plaintiff

1 an extension of time to file a motion in opposition to defendants' motion for summary judgment
 2 (#31). Instead of filing a substantive opposition, plaintiff filed a motion for enlargement of time
 3 to complete discovery (#32/33). The court denied this motion as plaintiff had previously been
 4 granted two discovery extensions (#36). However, the court granted plaintiff one final extension
 5 of time to file a substantive opposition to defendants' motion for summary judgment. *Id.*

6 On November 30, 2007, plaintiff filed his "opposition," arguing that he was still waiting
 7 for medical treatment that would prove his case and would be better able to respond at a later time
 8 (#37).⁴ Thus, plaintiff failed to comply with the court's order to substantively respond to
 9 defendants' arguments by citing law, making arguments, and submitting evidence to support his
 10 allegations. Even if plaintiff was awaiting medical care, and has since received it, he has not
 11 made a request to submit a revised opposition with his new evidence. There have been no filings
 12 in almost six months. Based on these considerations, the court will proceed on the evidence
 13 before it.

14 **2. Merits**

15 Defendants submit the Declaration of Karen Walsh, NDOC Health Information Director,
 16 who reviewed plaintiff's medical records on March 14, 2007 (#23, Exhibit D).⁵ According to
 17 plaintiff's medical records, plaintiff reported to medical staff that he received a gunshot wound
 18 to the head in 1994, and as a result, suffers from an "arteriovenous (AV) fistula." *Id.* at ¶ 6a-b.
 19 Plaintiff received an angiogram on July 22, 2004, which confirmed the presence of the AV fistula.
 20 *Id.* at ¶ 6c. Plaintiff saw Dr. Earl Cottrell, a vascular specialist, on August 25 and September 8,
 21

22 ⁴ Plaintiff attached three medical documents from the University Medical Center in Las Vegas dated
 23 November 20, 2007. *Id.*, Exhibits 1-3. These documents indicate that as of November 2007, plaintiff was
 24 in the process of obtaining approval for an angiogram. *Id.* The documents further state that plaintiff's
 25 diagnosis is "L Temporal AV fistula," and that he needs a "carotid angiogram with cranial views and possible
 26 embolization." *Id.* While this supports NDOC's diagnosis, it does nothing to prove plaintiff's claims of
 27 deliberate indifference.

28 ⁵ The court notes that defendants submit Ms. Walsh's declaration instead of plaintiff's medical
 records. While a declaration is sufficient evidence, the court prefers reviewing the medical records in tandem
 with the declaration, and directs counsel to submit copies of the relevant medical records in future Eighth
 Amendment cases.

1 2004. *Id.* at ¶ 6d-e. At Dr. Cottrell's request, plaintiff received a cat-scan of his head on October
2 10, 2004. *Id.* at ¶ 6d, 6f. On December 2, 2004, an outside surgeon, Dr. Caresio, performed an
3 embolization to repair the AV fistula. *Id.* at ¶ 6g.

4 On February 24, 2005, plaintiff was transferred to NDOC's Regional Medical Center at
5 NNCC. *Id.* at ¶ 6h. Dr. Janet Albright performed a second embolization procedure on plaintiff
6 on August 3, 2005, and a third embolization on October 3, 2005. *Id.* at ¶ 6i-k. Plaintiff received
7 a follow-up visit with Dr. Albright in between these two procedures. *Id.* Dr. Albright notified
8 plaintiff in April 2006 that she believed that plaintiff's AV fistula was not suitable for further
9 surgery and that she did not think it could be further treated with conventional treatments. *Id.*
10 at ¶ 6l. Ms. Walsh states in her declaration that while plaintiff was on "virtually continuous pain
11 medication" between July 2004 and the date of his release, his medication "was adjusted on
12 several occasions for various reasons." *Id.* at ¶ 6n-o.

13 Plaintiff attached evidence to his complaint which reveals that in October 2004, he was
14 in pain and awaiting surgery (#13, Exhibit A, p. 8-A-1). After his December 2, 2004 surgery,
15 plaintiff complained in grievances that Dr. Mumford refused him a follow-up visit with Dr.
16 Caresio, discharged him from the infirmary to general population, and discontinued plaintiff's
17 Tylenol #3 prescription. *Id.* at p. 8-A-2 to 8-A-7. Plaintiff was given regular Tylenol, which he
18 stated did not help his headaches that were "worse & now in '3' areas of my head & swelling is
19 now in my jugular vein on the right side." *Id.* at 8-A-2 .

20 Defendant Hartman responded to these grievances. He cited plaintiff's medical chart,
21 which revealed that on December 29, 2004, Dr. Caresio informed Dr. Mumford that plaintiff's
22 AV malformation was "large" and "not suitable" for further embolization. *Id.* at p. 8-A-7. Dr.
23 Caresio suggested that plaintiff be evaluated by a neurosurgeon in six months. *Id.* According to
24 plaintiff's chart, Dr. Mumford told plaintiff this information and plaintiff understood. *Id.*
25 Further, aside from the continued chronic headaches, plaintiff reported having improved
26 symptoms. *Id.* Dr. Mumford stated that he discontinued the Tylenol #3 so that plaintiff could
27 be discharged to the yard. *Id.* On January 4, 2005, the medical chart indicates that plaintiff asked
28 to be re-admitted to the infirmary, but Dr. Mumford denied his request. *Id.* Dr. Mumford stated

1 that plaintiff became “very angry at my refusal to admit him to the Infirmary for protection.” *Id.*
2 Plaintiff denies that he asked for protection and states that he was simply trying to get medical
3 treatment. *Id.* Dr. Mumford saw plaintiff again on January 25, 2005. *Id.* at 8-A-8.

4 Between February and April 2005, plaintiff filed grievances and wrote to the Inspector
5 General’s office stating that the medical department was ignoring his medical kites and that they
6 would not allow him a copy of his medical file. *Id.* at 8-A-10 to 8-A-22. As noted above,
7 plaintiff was then transferred to the Regional Medical Facility, and received two more
8 embolizations in 2005.⁶

9 In March or April 2006, Dr. Albright spoke with specialists in Reno about plaintiff’s
10 condition. *Id.* at 8-A-40. As a result of these conversations, Dr. Albright determined that there
11 was nothing more that could be done to treat plaintiff; thus, plaintiff’s March 31, 2006 follow-up
12 appointment with an outside specialist was cancelled. *Id.* The evidence further indicates that Dr.
13 Albright believed that plaintiff’s “only option is possibly a research facility in Calif. like
14 Stanford.” *Id.* Plaintiff was given this information on April 11, 2006. *Id.* Plaintiff filed a
15 grievance stating that he was being denied medical care and asking why he could not be sent to
16 Stanford. *Id.* at 8-A-25 to 8-A-31. NDOC Medical Director Bannister responded, stating that he
17 had spoken with plaintiff’s physicians, that the physicians were aware of plaintiff’s condition, and
18 that plaintiff was being treated appropriately. *Id.* at 8-A-31. During this time, there is some
19 evidence indicating that plaintiff was not receiving his prescribed pain medication.

20 In November 2006, plaintiff requested another consultation with Dr. Albright, and was
21 placed on the “M.D. list” (#23, Exhibit C-2, pp. 27-28). It is unclear whether he ever saw Dr.
22 Albright. Plaintiff was discharged from prison in August 2007.

23 In response to an interrogatory, plaintiff described his current symptoms to include blood
24 build-up in his neck and head, pounding and ringing in his right ear, severe headaches, and
25

26 ⁶ Plaintiff also submits a declaration which details separate attempts by two NNCC caseworkers to
27 get plaintiff to sign paperwork declaring that NDOC could disregard his grievances, that he was receiving
28 proper medical care, and that all his problems had been resolved (#13, Exhibit A, p. 8-A-24). These attempts
were allegedly at the request of NNCC’s Assistant Warden and in response to the prison discovering that
plaintiff was trying to hire a lawyer. Plaintiff refused to sign.

1 pounding on the right side of his head (#23, Exhibit B-2, Interrogatory Response 10). He also
2 stated that he often has sharp chest pains, and gets nauseated from the pain he endures. *Id.*

3 Defendants argue that plaintiff received sufficient medical care, but that if the court finds
4 otherwise, defendants actions constitute negligence only (#23, p. 6). Plaintiff does not respond
5 except to state that he will be submitting evidence in the future.⁷

6 There is no question that plaintiff's medical condition constitutes a "serious" medical
7 condition. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). However, there is no evidence that
8 defendants acted with deliberate indifference. Even taking as true plaintiff's allegation that Dr.
9 Caresio did not see the angiogram prior to the December 2, 2004 embolization – which
10 defendants do not deny – there is no evidence that this was intentional on defendants' part. Based
11 on the evidence currently before the court, the most this lapse would constitute is negligence.
12 Negligence is not actionable under the Eighth Amendment. *Toguchi v. Chung*, 391 F.3d 1051,
13 1057 (9th Cir. 2004).

14 Moreover, there is no evidence to demonstrate that had Dr. Caresio seen the angiogram
15 prior to the December 2, 2004 embolization, he would have performed a different procedure.
16 Although plaintiff claims that Dr. Caresio performed the "wrong procedure," plaintiff does not
17 inform the court or even allege what procedure should have been performed and why this would
18 have made a difference. There is no evidence which demonstrates that another procedure would
19 have been more successful.

20 Finally, there is no evidence that the performance of the December 2, 2004 embolization
21 caused irreversible harm to plaintiff's condition. Even though plaintiff alleges that his AV fistula
22 can never be repaired as a consequence of the December 2, 2004 embolization – which plaintiff
23 claims never would have occurred had Dr. Caresio seen the angiogram – plaintiff has failed to
24 present any evidence to support this allegation.

25
26 ⁷ Defense counsel affirms that plaintiff also failed to propound any discovery requests (#23, Exhibit
27 A, ¶ 15). Further, defense counsel affirms that plaintiff produced only thirteen pages of documents in
28 response to her requests, but indicated that the documents attached to his complaint were responsive to
defendants' discovery requests. *Id.* at ¶¶ 10, 12.

1 It is clear from the evidence that in 2004, plaintiff received pain medication, an
2 angiogram, a cat-scan, two appointments with a vascular surgeon, and an embolization. In 2005,
3 he was moved to NNCC, and received two more embolizations and further visits with vascular
4 surgeons. After three embolizations, plaintiff's physicians consulted with outside specialists and
5 concluded that nothing more could be done to assist plaintiff. The evidence also indicates that
6 plaintiff's March 31, 2006 appointment with an outside physician was not cancelled as a result
7 of defendant Bannister's policy, but because there was no further conventional treatment available
8 to plaintiff. Plaintiff has cited no case which stands for the proposition that the Eighth
9 Amendment requires defendants to send inmates out-of-state for experimental treatments. Based
10 on the evidence before the court, the court concludes that there are no genuine issues of material
11 fact, and that plaintiff has not presented evidence which demonstrates that defendants acted with
12 deliberate indifference.

13 III. CONCLUSION

14 Based on the foregoing and for good cause appearing, the court concludes that plaintiff
15 has failed to present any evidence to support his allegations that defendants deliberately withheld
16 medical evidence from his specialist. The court further concludes that there is no evidence that
17 this specialist performed the wrong procedure on plaintiff as a result of not receiving plaintiff's
18 angiogram, or that the procedure cause irreversible damage to plaintiff's condition. As such, the
19 court recommends that defendants' motion for summary judgment (#23) be **GRANTED**.

20 The parties are advised:

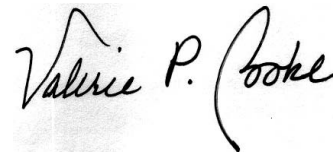
21 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
22 the parties may file specific written objections to this report and recommendation within ten days
23 of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
24 Recommendation" and should be accompanied by points and authorities for consideration by the
25 District Court.

26 2. This report and recommendation is not an appealable order and any notice of appeal
27 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's
28 judgment.

IV. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that defendants' motion for summary judgment (#23) be **GRANTED**.

DATED: May 16, 2008.



UNITED STATES MAGISTRATE JUDGE